

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

FILED

JUL 13 2009

CLERK, U.S. DISTRICT COURT

By

Deputy

UNITED STATES OF AMERICA

v.

DAVID E. KATES

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No. 2:97-CR-0042 (1)
(USCA Appeal No. 09-10242)

**ORDER ADOPTING FINDINGS OF FACT AND
MAKING ADDITIONAL FINDINGS OF FACT**

The instant cause was remanded on April 29, 2009, to this Court for a determination of whether Kates' Notice of Appeal was timely filed. Although Kates' *pro se* Notice of Appeal is dated October 10, 2008, it is file-stamped as of March 5, 2009. Kates represents, however, that the March 5, 2009 notice is a duplicate of a Notice of Appeal he signed October 10, 2008. On May 14, 2009, Kates submitted his Affidavit stating he mailed his Notice of Appeal "on or around" October 10, 2008, by giving it to prison authorities for mailing while incarcerated at the F.C.I. Pekin. On May 28, 2009, the government submitted documents relating to the issue before the Court.

On June 24, 2009, the Magistrate Judge, after considering the submissions on the issue, made the Finding of Fact that the sole evidence supporting a timely submission of appeal, Kates' Affidavit that his Notice of Appeal was signed and delivered to prison authorities on October 10, 2008, is not credible, that Kates did not deposit a Notice of Appeal on October 10, 2008, as he has represented, and that Kates has not claimed to have submitted any other Notice of Appeal in a timely fashion.

Kates filed his Objections on July 7, 2009, arguing, in relevant part, that, by his May 14, 2009 Affidavit, he had stated he filed his Notice of Appeal on or around October 10, 2008. Kates says that date was a "guesstimation date" and that the mail records reflect unidentified mail from him to the District Court on October 16th and mail to the U.S. Court of Appeals for the Fifth Circuit on October 17, 2008 which, he says, contained his Notice of Appeal and another document addressing a separate issue. An inquiry placed with appropriate personnel at the U.S. Court of Appeals for the Fifth Circuit and with the Clerk's Office on the district court level revealed no Notice of Appeal was enclosed with the referenced document in any district court mail and there is nothing in the file of that document in the Fifth Circuit which resembles a Notice of Appeal in this or any other action.

The Court has made an independent examination of the records in this case and has examined the Magistrate Judge's Finding of Fact. Review of the document Kates represents is a duplicate of an earlier-submitted Notice of Appeal shows it purports to have been signed October 10, 2008. This duplicate Notice of Appeal contains no "on or around" language; however, by his Objections, Kates informs the Court he did not receive the dismissal in this case until October 14, 2008, four days after the date on the "duplicate" of his Notice of Appeal. It appears Kates' "duplicate" of his alleged October 10, 2008 Notice of Appeal is not a true and correct copy of such document, a fact which undermines Kates' credibility.

The Court is of the opinion the Magistrate Judge's findings should be adopted by the United States District Court.

Further, to the extent Kates' language of "on or around October 10, 2008" contained in his May 14, 2009 Affidavit, constitutes a representation that he timely mailed his Notice of Appeal on some date other than October 10, 2008, the Court **MAKES THE FOLLOWING SUPPLEMENTAL FINDINGS OF FACT:**

- (1) Kates' purported duplicate of his Notice of Appeal is not a true and correct copy of his Notice of Appeal, and


- (2) there is no credible evidence that Kates submitted a timely Notice of Appeal in this cause.

This Court, therefore, does hereby ADOPT THE FINDING OF FACT OF THE UNITED STATES MAGISTRATE JUDGE, AS SUPPLEMENTED ABOVE.

The Clerk will transmit a copy of this Order to the United States Court of Appeals for the Fifth Circuit in order to supplement the record on appeal in this cause.

IT IS SO ORDERED.

ENTERED this 10th day of July, 2009.


MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE